Filed 1/12/10 P. v. Jordan CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TYRONE DARNELL JORDAN, Defendant and Appellant.	B212878 (Los Angeles County Super. Ct. No. VA100986)

APPEAL from a judgment of the Superior Court of Los Angeles County, Beverly R. O'Connell, Judge. Reversed in part, affirmed in part, and remanded with directions.

Jeffrey S. Kross for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Tyrone Darnell Jordan appeals from the judgment entered following a jury trial in which he was convicted of four counts of attempted willful, deliberate and premeditated murder, counts 1-4 (Pen. Code, §§ 664/187, subd. (a); 664, subd. (a)) with the finding that during the commission of the offenses, he personally used a deadly and dangerous weapon, a Molotov cocktail, within the meaning of Penal Code section 12022, subdivision (b)(1), of exploding or igniting an explosive or destructive device with intent to murder, count 5 (Pen. Code, § 12308), and of arson of an inhabited structure or property, count 6 (Pen. Code, § 451, subd. (b)). In a bifurcated court trial, he was found to have suffered a prior conviction of a serious or violent felony within the meaning of the "Three Strikes" law. (Pen. Code, §§ 1170.12, subds. (a) through (d) and 667, subd. (b) through (i).) He was sentenced in count 1 to prison for life with the possibility of parole plus one year for the dangerous weapon enhancement. In counts 2 through 5 he was sentenced to concurrent terms of life with the possibility of parole, plus one year for the dangerous weapon enhancement added to counts 2 through 4. For count 6, the court imposed the upper term of eight years, doubled to 16 years by reason of appellant's prior strike conviction. He contends his juvenile adjudication cannot qualify as a prior strike, the court erred by imposing a separate consecutive term for arson of an inhabited structure as the arson was incident to the object of attempting to commit murder, and that insofar as attempted murder is a necessarily included offense of igniting a destructive device with the intent to commit murder, appellant should not have been convicted of four counts of attempted murder and one count of igniting an explosive or destructive device. For reasons stated in the opinion, we reverse the conviction in count 5 and, in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The evidence at trial established that appellant and Pamela Jordan were married in December 2001 and that she filed for divorce in June 2006. At the time of trial in July 2008, the couple was legally separated and divorce proceedings were still pending.

In 2005, on her own, Mrs. Jordan purchased a home on Cedar Street in Bellflower. Appellant told Mrs. Jordan he did not like the house and was not happy she had

purchased it; he did not think it was the right time to buy a home and thought they should rent something instead. Appellant never wanted to move into the house and for that reason did not immediately move into the house upon the close of escrow. He finally did move into the house in May 2005 and lived there until October 2006. After Mrs. Jordan told appellant she was divorcing him, he became desperate, threatening to kill himself and everyone he loved. In March 2007, appellant threatened to blow up the "mother fucker house" and stated that he never liked it anyway.

On March 14, 2007, Ashley Romain, appellant's 22-year-old stepdaughter, served appellant with a restraining order. Ms. Romain recalled appellant threatened her and her family. He said he "wasn't going to give up getting his family back, and that if he couldn't have his family, . . . he was going to kill his family and himself."

On May 13, 2007, at approximately 1:40 a.m., Ms. Romain was upstairs in her bedroom when she heard the home's vehicle gate click open. When she looked out her window, she saw appellant run through the gate while holding a flaming object in his hand. She then saw appellant cock back his hand and throw the flaming object through her home's living room window, catching the living room on fire. Ms. Romain awakened her family members[1] and they escaped.

The fire heavily damaged the living room and the upstairs sustained significant smoke and heat staining. The remains of a Molotov cocktail were found on the interior ledge of the living room window and a butane cigarette lighter was found in the dirt outside of the house directly below the window. As a result of this incident, the family had to find a new home and Mrs. Jordan lost all of her belongings. Because of financial problems, she had previously canceled her fire insurance.

DISCUSSION

I

Appellant contends increasing his sentence under the Three Strikes law based on a prior juvenile adjudication violates his constitutional right to trial by jury. Appellant

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[1] In addition to Mrs. Jordan and Ms. Romain, Mrs. Jordan's five-year-old daughter, Amber, and teenage son, Andre Romain, were in the home.

acknowledged that at the time of the writing of his brief, the California Supreme Court was considering the issue.

In July 2009, in *People v. Nguyen* (2009) 46 Cal.4th 1007, our Supreme Court concluded use of a prior juvenile adjudication to enhance a defendant's sentence under the Three Strikes law did not violate a defendant's constitutional right to trial by jury. Accordingly, appellant's claim is rejected.

II

When sentencing appellant in count 6, the court stated it was selecting the upper term of eight years based on his numerous prior felony convictions and the increasing seriousness of these offenses. Additionally, the court stated it was exercising its discretion and imposing the term consecutively, noting, "this count is different than Count 1, the attempted murder case."

Appellant contends the trial court erred by imposing a separate consecutive term for arson of an inhabited structure as the arson was incident to the objective of attempting to commit murder. He argues he was convicted in counts 1 through 4 of the attempted murder of his four family members by personally using a deadly weapon, a Molotov cocktail, and that, pursuant to Penal Code section 654, the court should have stayed the sentence imposed on count 6. We disagree.

Penal Code section 654 provides in pertinent part, "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished

for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.] [¶] As a general rule, the sentencing court determines the defendant's 'intent and objective' under section 654. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

Contrary to appellant's claim that in throwing the Molotov cocktail into the family home he harbored no extraneous criminal intent beyond the murder, the record supports the trial court's conclusion that appellant had multiple objectives, the intent to commit multiple murders and the intent to destroy the family home. The record indicates the home was a source of displeasure and conflict for appellant and that two months before the arson he threatened to blow it up. The consecutive sentence for the arson count did not violate Penal Code section 654.

III

Appellant contends that because attempted murder is a necessarily included offense of igniting a destructive device with the intent to commit murder, appellant should not have been convicted of four counts of attempted murder and one count of igniting a destructive device. Respondent agrees.

"To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when '"all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense '"if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

The jury was instructed pursuant to Judicial Council of California Criminal Jury Instructions (2007) CALCRIM No. 600 that in order to prove appellant guilty of attempted murder, the People were required to prove that appellant "took direct but ineffective steps toward killing another person;" and appellant "intended to kill that person." Additionally, the court instructed the jury pursuant to CALCRIM No. 2576 that to prove appellant guilty of igniting an explosive or a destructive device with intent to commit murder, the People must prove appellant "ignited an explosive or a destructive device;" and when appellant "did so, he acted with the intent to murder someone." One cannot explode or ignite an explosive or destructive device with the intent to murder someone without also committing a direct but ineffective act with the intent to kill. Thus attempted murder is a necessarily included offense to the crime of igniting an exploding or destructive device with the intent to murder. (See *People v. Medina* (2007) 41 Cal.4th 685, 701; *People v. Johnson* (1978) 81 Cal.App.3d 380, 389; *People v. Gray* (1979) 91 Cal.App.3d 545, 557 [assault with intent to commit murder necessarily includes attempted murder].)

"[M]ultiple convictions may *not* be based on necessarily included offenses. [Citation.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) "It has often been stated that the prohibition [of Penal Code section 654] against double punishment applies where one offense is necessarily included in another. [Citations.] In such a case double conviction is also prohibited [citation] . . . ." (*People v. Bauer* (1969) 1 Cal.3d 368, 375.)

As the parties agree, since the offense of attempted premeditated, willful, and deliberate murder provides for a longer potential term of imprisonment when the weapon enhancement is included, the court is obligated under Penal Code section 654 to strike the conviction in count 5 and affirm the four convictions and weapon enhancements for counts 1 through 4. (See *People v. Medina* (2007) 41 Cal.4th 685, 702; *People v. Kramer* (2002) 29 Cal.4th 720, 722-725.)

DISPOSITION

The conviction in count 5, the crime of exploding a destructive device with intent to murder, is reversed and in all other respects the judgment is affirmed. The matter is remanded to the trial court with directions to prepare a new abstract of judgment and forward same to the Department of Corrections and Rehabilitation.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.